SUPREME COURT U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 552

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee,

—against—

ALBERT SHANKER, and Others, etc.,

Defendants,

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO.

Appellants.

JURISDICTIONAL STATEMENT

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Appellants.

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the New York Court of Appeals, dated June 5, 1969, which affirmed the order of the Appellate Division of the Supreme Court, First Judicial Department, entered on March 31, 1969, which affirmed the order and mandate of the Supreme Court of the State of New York, County of New York, entered on February 6, 1969, adjudging the appellants guilty of criminal contempt and sentencing the individual appellant to a jail term and a fine and the union appellant to a fine.

Opinions Below

The final decision of the New York Court of Appeals is not yet reported. The intermediate decision and the opinions of the New York Court of Appeals are reported at 23 N.Y. 2d 111, 295 N.Y.S. 2d 625, 242 N.E. 2d 802. The Appellate Division of the Supreme Court affirmed both the intermediate order and the final order and mandate of the Supreme Court of New York without opinion. The orders of affirmance are reported at 30 A.D. 2d 956, 294 N.Y.S. 2d 680, and 31 A.D. 2d 1010, 299 N.Y.S. 2d 371. The intermediate order and final order and mandate of the Supreme Court of New York are not reported. The intermediate and final opinions of the New York Court of Appeals and of the Supreme Court of New York are set forth in the Appendices A-D, *infra*, pp. 1a, 3a, 31a, 55a.

Jurisdiction

The proceeding on appeal is one to determine the guilt or innocence of appellants on a charge of criminal contempt and, if guilty, to impose a sentence. The proceeding was brought pursuant to the Judiciary Law of the State of New York and, more particularly as set forth in the order to show cause which initiated the proceeding, "Sec. 750 et seq." of said Judiciary Law.

The appellants moved for a trial by jury as provided in Section 753-a of the Judiciary Law and Section 808 of the Labor Law of the State of New York prior to the commencement of the trial. The motion was denied by construing those statutes to exclude appellants from their ambit and an immediate appeal was taken pursuant to a

provision permitting appeals from intermediate orders affecting substantial rights. The order was affirmed and an appeal was taken to the New York Court of Appeals with the permission of the Appellate Division of the Supreme Court to appeal an intermediate order. The New York Court of Appeals on October 30, 1968 affirmed by a vote of 4-3, three opinions being written. An application for a stay of the trial pending an appeal to this Court was denied (393 U.S. 930).

A trial without a jury was thereafter held and the appellants were found guilty of criminal contempt. The order on that finding was appealed on the sole question of appellants' right to a trial by jury.

The judgment sought to be reviewed is dated June 5, 1969 and was entered on the same date. Notice of appeal was filed in the Supreme Court of New York, County of New York, on August 28, 1969.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. Sec. 1257(2). The following cases are believed to sustain jurisdiction: *Puentes* v. *Board of Education of Union Free School District No. 21, Town of Bethpage, Nassau County, New York*, 392 U.S. 653 (1968), *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), *Winters* v. *People of State of N. Y.*, 333 U.S. 507 (1948).

Statutes Involved

Section 753-a of the Judiciary Law of the State of New York, 29 McKinney's Consolidated Laws of New York at page 207 (App. E, p. 63a).

Section 808 of the Labor Law of the State of New York, 30 McKinney's Consolidated Laws of New York at page 416 (App. F, p. 65a).

Questions Presented

Appellants, a union which represents public and private employees and its president, were found guilty of criminal contempt for wilfully disobeying a court order enjoining them, *inter alia*, from engaging in a strike against the Board of Education of the City of New York and from picketing.

Appellants sought a trial by jury under State statutes which provide that "no person shall be punished by fine or imprisonment for any alleged contempt arising out of any failure or refusal to obey any mandate of the court contained in or incidental to an injunction order granted by said court in any case involving or growing out of a labor dispute except after a trial by jury to which the defendant shall be entitled as a matter of right . . . " The New York Court of Appeals, by a vote of 4-3, construed the statutes so as to exclude public employees and public employee unions from their coverage.

The questions presented are: (1) whether the construction of the New York statutes by the Court of Appeals of the State of New York deprives appellants of the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States in that such construction results in denying them, because they are a public employee union and officer, the right to a jury trial in a criminal contempt proceeding arising out of a labor dispute, while granting such right to all non-public employee unions and officers; and

(2) whether the construction of the New York statutes by the Court of Appeals of the State of New York denying a trial by jury to appellants in a criminal contempt proceeding results in a deprivation of liberty and property without due process of law as guaranteed by the 14th Amendment to the Constitution of the United States because such statutes as so construed are overbroad and not limited to the area of permissible application.

Statement of the Case

Appellant United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) is a union representing teachers in public and private schools. Appellant Albert Shanker (Shanker) is its president. Appellee, Corporation Counsel of the City of New York, initiated a proceeding to find appellants guilty of and to punish them for criminal contempt for wilful disobedience to a court order enjoining them, *inter alia*, from striking the Board of Education of the City of New York and from picketing.

The appellants were found guilty after a trial without a jury. The UFT was fined $220,000. Shanker was ordered imprisoned for 15 days and fined $250. All fines have been automatically stayed pursuant to statute pending the determination of this appeal. The jail sentence has been stayed pursuant to court orders pending the determination of this appeal.

Appellants moved for a trial by jury in the court of first instance prior to the commencement of the trial. They asserted their rights by motion at the outset, and in each appellate court, under the 6th and 14th Amendments to

the Constitution of the United States including their right to the equal protection of the laws (T 519, 523, 526-527, 536).[1]

The government made no secret of its reason for seeking to deny a trial by jury to the appellants. On October 29, 1968, in his argument before the Court of Appeals of the State of New York, the Corporation Counsel baldly asserted:

> "In the present situation it would be hard to get a jury to agree on anything."

It is conceded that these very same appellants would have the right to a trial by jury under Section 753-a of the Judiciary Law or Section 808 of the Labor Law in a contempt proceeding for an alleged wilful disobedience to a court order enjoining them from striking and picketing if the employees whom they represented in the particular labor dispute were employed by a private rather than a public school system.

The New York Court of Appeals in the final judgment appealed from relied on its earlier intermediate decision in which it remanded the case for trial without a jury.

The majority wrote: "Contrary to the defendants' contention, to refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not violate the equal protection of the laws under the Constitution of either the United States or New York State" (App. C, p. 36a).

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[1] The symbol "T" refers to the pagination contained in the excerpt from the transcript of the trial court proceedings which is part of the certified record herein.

The majority further wrote: "Strikes by employees in certain private industries may, as Judge Keating noted in dissent (Opn., p. 134), be just as paralyzing in their impact upon the public as strikes by workers in public employment. But the Legislature has not seen fit to legislate with regard to such strikes" (App. C, p. 38a).

Judge Burke in a dissent in which two other judges concurred wrote: "The issue is of constitutional dimension . . ." (App. C, p. 47a); and further wrote that there was a "serious constitutional deprivation of equal protection involved in the majority's construction of these statutes . . ." (App. C, p. 51a).

Judge Keating in a dissent in which two other judges concurred, wrote about both the undercoverage and overbreadth of the statutes as construed noting that they fail to cover private employees who "carrying out activities vital to the life and safety of the city may demand a trial by jury" (App. C, p. 54a), while denying a trial by jury to all public employees whether or not their job is vital to the public weal.

The Questions Are Substantial

1. This appeal brings to the Court a matter of fundamental constitutional law with important ramifications for the Nation's jurisprudence.

It applies to that growing segment of our population which works for one or another of our governmental bodies.[2] It applies directly to those governmental bodies.

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[2] Between 1962 and 1968 state and local government employment rose from 6½ million to more than 9,500,000. By mid-1968 Federal employment had increased to 2¾ million. U. S. Department of Labor, Monthly Labor Review, January 1969, p. 104; U. S. Department of Labor, Employment and Earnings Statistics for the United States, 1909-1968, Bull. No. 1312-6 pp. 824, 825.

Moreover, on the specific questions presented, whether the statutes as construed are constitutional, at least 16 states have similar statutes, all patterned on the legislation proposed by Mr. Justice (then Professor) Felix Frankfurter and Nathan Greene in their seminal book, *The Labor Injunction*, MacMillan Co., 1930,[3] except for the Minnesota statute which is patterned after the Clayton Anti-Trust Act, 38 Stat. 738 (1914), now 18 USC Rule 42.

States have held, contrary to the decision on appeal, that public employee unions have the right to a trial by jury in criminal contempt proceedings. *Dade County Classroom Teachers Association, Inc.* v. *Rubin, etc., et al.* (Fla. Sup. Court), 70 LRRM 2235 (Dec. 10, 1968).

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[3] Hawaii, S.B. 545, L. 1963, Sec. 11; Idaho, L. 1933, Ch. 215, Sec. 44-710; Indiana, L. 1933, Sec. 40-511; Louisiana, Acts 1934, No. 203, 23:848; Maine, Ch. 107, Sec. 37; Maryland, Annotated Code, 1939, L. 1935, Ch. 374, Sec. 72; Massachusetts, L. 1935, Ch. 407, Sec. 5; Minnesota, L. 1917, Ch. 493, Sec. 185.16; New Jersey, L. 1941, c. 15, Art. 8, Sec. 2A:15-56; North Dakota, L. 1935, Ch. 247, Sec. 34-0811; Oregon Revised Statutes, Ch. 662, Sec. 662.130; Purdon's Pennsylvania Statutes Annotated, Title 17, Chapter 20, Sec. 2047 and Title 43, Secs. 206a-206r; Rhode Island, P.L. 1951, Ch. 2748, Sec. 6, amending Ch. 299, as previously amended by Ch. 2359, P.L. 1936 and by Ch. 2619, P.L. 1938; Utah, L. 1933, Sec. 34-19-9, amended by S.B. 30, L. 1969; Washington, L. 1933, Ch. 7, Sec. 49.32.090; Wisconsin, L. 1931, Sec. 103.60.

The Federal Norris-LaGuardia Act, 29 U.S.C. Secs. 101-115 and 18 U.S.C. Sec. 3692 (formerly 29 U.S.C. Sec. 111) was also patterned after the Frankfurter-Landis proposal.

In this connection it is noted that the majority cited as authority for its construction of New York State's statutes the decision of this Court in *U. S.* v. *United Mine Workers of America*, 330 U.S. 258 (1947). That case is obviously distinguishable in that (1) this Court relied upon the specific limiting language in the jury trial provision of the Federal law which is absent from the state statutes, (2) this Court was able to refer to a legislative history which does not exist with respect to the New York statutes, (3) the equal protection of the laws issue was never presented to this Court, (4) because an advisory jury was waived, and (5) because since the decision in *Mine Workers, supra*, this Court has given added recognition to the importance of a trial by jury in a criminal contempt proceeding.

The instant case falls within an area of the law which this Court is currently in the process of mapping on a case by case basis, namely: the rights and obligations of public employees and the correlative rights and responsibilities of public employers.

The imperative need for the continuation of this process is evident both from the standpoint of the interests of governmental bodies and of their more than 12,000,000 employees and the families of those employees. Such need was recently recognized by a court in the case of *Olson* v. *University of Minnesota,* U.S.D.C., Dist. of Minn., Fifth Div., Docket No. 5-69 Civ. 28 (unreported), which, in ordering the reinstatement of a university employee for failure of the university to follow procedural due process in its dismissal, quoted from Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1461, 1462 (1968). That article, in part, reads at those pages:

> "With the increasing size of government as an economic unit, moreover, it is simply no longer true that a particular infringement related to employment by government is no greater than a particular infringement made by a private employer. . . .
>
> "If, under a functional analysis, the conclusion reached by Justice Holmes in 1892 is no longer viable, then Holmes' own methodology should be used to label an individual's interest in his public status a 'right' directly protected against unreasonable regulation. Such unreasonableness need involve only the lack of a sufficient connection with an adequately compelling public interest to warrant subordinating the individual interest under the circumstances."

This last statement is precisely what the dissenters found to be the situation in this case.

This Court, by its recent actions, has demonstrated its awareness of our Nation's need for added clarity in the area of the judicial rights of governments and their employees, repeatedly holding that acceptance of government employment does not entail the loss of legal rights.

Gardner v. *Broderick*, 392 U.S. 273 (1968);
Pickering v. *Board of Education*, 391 U.S. 563 (1968);
Garrity v. *New Jersey*, 385 U.S. 493 (1967);
Elfbrandt v. *Russell*, 384 U.S. 11 (1966);
Cramp v. *Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278 (1961);
Shelton v. *Tucker*, 364 U.S. 479 (1960);
Slochower v. *Board of Higher Education*, 350 U.S. 551 (1956);
Wieman v. *Updegraff*, 344 U.S. 183 (1952).

The striving for equality before the law is based on man's natural sense of injustice. Cahn, *The Sense of Injustice*, 15 (1949). This Court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), traced the quest for equality before the law to the Magna Charta and in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), applied it to the right to a trial by jury.

This Court has specifically stated that public employees "are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

The issue of the equal right of a public employee with that of a private employee to a trial by jury is ripe for

consideration by this Court. The issue was presented in *DeLury* v. *City of New York*, —— U.S. ——, 89 S.Ct. 1224 (1969) but dismissed for want of a properly presented federal question. In that case, unlike this case, no demand for a trial by jury was made until after the trial court had rendered its decision. Public employees and public employee unions in other jurisdictions are currently appealing decisions denying them the right to a trial by jury in contempt cases arising out of alleged disobediences to court orders, although the constitutional issues raised in those cases are not identical to the issues presented on this appeal. E.g., *Board of Education of Kankakee School Dist. 111* v. *Kankakee Federation of Teachers, Local 886, AFT, AFL-CIO,* Docket No. 42506 now before the Ill. Sup. Ct. (no reported decision); *Junior College Board School Dist. No. 508* v. *Cook County College Teachers Union, Local No. 1600, AFT, AFL CIO, Norman Swenson, et al.*, Docket No. 52465, now pending in Ill. App. Ct. (no reported decision).

As the role of government in the lives of all the people grows, the importance of the caliber of the government employee likewise grows. Whether it be school teacher, social worker, nuclear physicist or drug analyst, it is important that governments be able to attract to their employ the best of our citizenry. To the extent that the acceptance of government employment results in the loss of legal rights enjoyed by others, and particularly when those rights are ones of procedural due process, in many instances directly protected by the Constitution (*Bloom* v. *Illinois*, 391 U.S. 194 (1968)), the ability of governments to attract employees of top qualifications will be diminished.

2. The nub of this case is concisely stated in the minority opinion of Judge Keating:

> "The question is not whether public employees differ from private employees or whether the former may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U.S. 107, 111)" (App. C, p. 53a).

The majority of the Court of Appeals wrote:

> "It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giving the courts the powers necessary to bring about their early termination" (App. C, pp. 37a-38a).

On the basis of its assumption the majority found an alleged purpose for the discrimination between public and private employees. It wrote:

> "Prompt determinations, unencumbered by the long, drawn out procedure involved in jury trials, are needed in criminal contempt proceedings under the Taylor Law in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders" (App. C, p. 37a).

Judge Keating, for the minority, replied:

> "The 'one vital reason' offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for 'Prompt determina-

tions' . . . In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]). While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.

In the case of the short jail terms provided by the statute as punishment against union leaders, and which can be imposed immediately, it is of crucial significance that, in three major strikes against the City of New York since the Taylor Law was enacted, the city found it impossible effectively to enforce the short jail sanction to end the strikes. The same situation prevailed for 20 years under the Condon-Wadlin Act (L. 1947, ch. 391). Therefore, while the Legislature has the right to experiment, we are here dealing with a situation where the reasons offered for drawing the distinction have been shown by historical precedent to have no basis" (App. C, pp. 53a-54a).

Judge Burke, for the minority, also replied:

"So, too, the circumstances of the recent history of public employer-employee labor relations would seem to indicate that the legislators, as practical, realistic men, realized that the very resort to the court and its process in such situations often tends to exacerbate and inflame an already critical situation and has even, in the recent past, itself become a key obstacle to the resolution of such disputes and the re-establishment of the sought-after harmony and co-operation between

public employers and their employees. In the face of these facts, is it reasonable to say that the Legislature could reasonably have concluded that the withholding of a right so universally recognized as an integral part of our system of administering justice would *hasten* the end of such public employee labor disputes? The time and the circumstances provide a rather clear-cut answer to that question. The conclusion is inescapable that, in the language of *McGowan (supra)*, [*McGowan* v. *Maryland*, 366 U.S. 420 (1961)] the distinction between public and private employees, in the context of the right to jury trial, is 'wholly irrelevant' to the achievement of the legislative objectives expressed in the Taylor Act. (Cf. the equal protection analysis in *Baxstrom* v. *Herold*, 383 U.S. 107, 111-112.) . . . It is difficult, if not impossible, to conceive of any way in which the *denial* of a jury trial, in a criminal contempt proceeding brought against a public employees' union and its officers and arising from a dispute with a governmental employer, is in any way relevant to or productive of harmony and co-operation or how it could possibly be relevant to the assurance of the orderly and uninterrupted operations and functions of the government. The issue involved goes merely to the *procedure* to be invoked when a labor dispute has already occurred and has resulted in a court order which has allegedly been violated and simply has no bearing whatever on the effectuation or frustration of the expressed legislative objectives. This is particularly apparent when it is recognized that the matter of jury trial arises only *after* events have occurred which necessitate a resort to the court and its mandates in an effort to enforce compliance which

has allegedly not been voluntarily forthcoming. Nor is it conceivable that the *denial* of such a right, especially when it is *granted* in criminal contempt proceedings arising from private labor disputes, could effectuate the objectives of harmony and co-operation and uninterrupted government operations in the future. Governmental entities can show no vital or even non-vital interest which will be served by denying these defendants a jury trial. In the face of the obvious lack of relevant connection between the public-private employee distinction as to the right to a jury trial and the objectives sought to be achieved by the legislation of which the denial of a right to jury trial is purportedly a part, there is a rather clear-cut deprivation of the equal protection of the law to which *both* public and private employees are entitled." (Emphasis in original.) (App. C, pp. 49a-51a).

The minority wrote:

"It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge CARDOZO: 'Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment" * * * are not to change their form and content in response to the "hydraulic pressure" * * * exerted by great causes.' (*Matter of Doyle*, 257 N.Y. 244, 268, quoting HOLMES, J., in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401.)" (App. C, p. 47a).

The words of this Court in *Reid* v. *Covert*, 354 U.S. 1 (1957) at page 14 are also apt:

> "The concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government."

Finally, this Court wrote in *Griffin* v. *State of Illinois*, 351 U.S. 12 (1956) at page 18:

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [Citations] But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

Similarly, even if the state is not required by the Federal Constitution to provide appellants with a trial by jury, that is not to say that a state that does grant a trial by jury to persons allegedly in contempt of a court order in a labor dispute can do so in a way that discriminates against some on account of the identity of their employer.

3. The majority sought to justify the discrimination which it wrote into the statutes in question by referring to the statement of a former Governor of the State of New York made in connection with a law since repealed for its failure. That law was designed to prohibit strikes by public employees and in no way related to the right to a trial by jury. The Governor's remarks referred to the danger to society which might result from a strike by policemen, firemen, sanitation workers or workers in a

mental hospital. It did not refer to any other public employees. This statement, to that extent, comports with the constitutional mandate that when rights are restricted or denied it behooves the government to limit its inhibitions and not entrench on areas where such entrenchment is unnecessary for the purpose of the legislation.

United States v. *Robel,* 389 U.S. 258 (1967);
Zwickler v. *Koota,* 389 U.S. 241 (1967);
Keyishian v. *Board of Regents,* 385 U.S. 589 (1967);
Aptheker v. *Secretary of State,* 378 U.S. 500 (1964);
Shelton v. *Tucker,* 364 U.S. 479 (1960).

Government employment includes not only policemen and firemen, but also school teachers and park department employees who manicure putting greens on public golf courses.

Assuming solely *arguendo* that a trial by jury in a criminal contempt case arising out of a labor dispute might constitutionally be denied to a policeman or fireman where the loss of his services for even a day might result in disaster, such an assumption does not warrant a construction of statutes which denies that right to public employees in positions where the cessation of their services does not cause such hardship.

The majority sought to widen the scope of the Governor's remarks. It wrote:

"And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and stat-

> utory right to a basic education—thereby severely handicapping them in their efforts to attain higher education and future employment—but it would also impair their respect for law" (App. C, p. 38a).

Surely it is unreasonable to maintain that education delayed is education lost. Fortunately, what is not learned yesterday can be learned tomorrow. The public schools in New York City were closed during some days in the Fall of 1968, but almost all lost time was thereafter made up by longer school days and shorter holidays. Students were not "severely handicap[ped] . . . in their efforts to attain higher education and future employment".

It cannot reasonably be maintained that the closing of schools by strike brings disaster upon a community. Schools are completely closed for more than two months during the summer and for extended holidays at other times during the year. Unlike the police and fire services, continuous operation is clearly not needed by teachers to maintain the health and safety of the community.

It is, of course, completely irrelevant to the students' "respect for law" that his teacher, after his illegal conduct, is found guilty of criminal contempt by a jury rather than by a judge without a jury.

Indeed, the poverty of the majority's reasoning in attempting to overcome the unconstitutionality inherent in its overbroad as well as unequal construction of the statutes, exposes the fallacy of its holding. The error in such a construction of the statutes is compounded when it results, as the minority points out, in the denial of rights to non-essential public employees while no such denial is imposed on private employees admittedly performing services more essential to the public health and safety.

CONCLUSION

For the reasons stated Appellants respectfully submit that this case presents substantial Federal questions concerning the scope of the 14th Amendment in the field of public employment. The need for consideration and resolution of these questions warrants that probable jurisdiction should be noted.

Respectfully submitted,

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